Salem Leasing Corp. *and* **Cecil Shields.** Case 11-CA-10662

29 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 27 May 1983 Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Salem Leasing Corp., Hickory, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Because we are adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Cecil Shields, we find it unnecessary to pass on his finding that the Respondent's discharge of Shields also constituted an independent violation of Sec. 8(a)(1) of the Act.

We also find it unnecessary to rely on the statement contained in Michael Gross' pretrial affidavit which the judge credited over Gross' contrary testimony at the hearing. We agree, however, with the judge that the Respondent unlawfully discharged Shields because of "a fear that Shields would continue to speak favorably of his union benefits." Thus, as found by the judge, Shields had a good work record at the time of his discharge, and that no disciplinary action was contemplated against him until he made the favorable statements about the benefits of his former, unionized employer. In fact, prior to his statements, he had satisfactorily completed his probationary period, and had been given additional responsibilities.

After his statements, however, the Respondent's view of Shields as an employee changed completely. From then on, as found by the judge, there was a "perceived urgency of the need to get rid of him." Shields' remarks were immediately discussed by a number of company officials—including the Respondent's president—and Shields was informed of his discharge the following week. In addition to the timing of the discharge, there was other evidence which also supported the judge's conclusion. Thus, for example, the Respondent's vice president, who was in charge of the facility involved here and who discharged Shields, stated the day before Shields' discharge that Shields was a good worker and hard to replace, but his "mouth . . . got [him] into trouble." He added "that [Shields] liked G.E., G.E.'s benefits, their pay, and stuff, so good, that he was going to let Mr. Shields go back to G.E." The vice president repeated that theme—letting Shields go back to G.E.—during the discharge conversation. Further, he had indicated the Respondent's preoccupation with being a nonunion company when he told employees a month prior to Shields' discharge that they ought to be "thankful that there wasn't any Union organizations [sic] because all these Union places was going broke . . . ." Accordingly, we find that the Respondent's discharge of Shields violated Sec. 8(a)(3) and (1) of the Act.

DECISION

BERNARD RIES, Administrative Law Judge. This proceeding was conducted in Hickory, North Carolina, on February 24, 1983. At issue is whether Respondent violated Section 8(a)(1) and/or (3) of the Act by discharging Cecil Shields on October 26, 1982.

Briefs have been filed by the parties.[1] Having considered the record and the briefs in light of my recollection of the demeanor of the witnesses, I make the following findings of fact,[2] conclusions of law, and recommendations.

Respondent is a North Carolina corporation engaged in the business of full-service truck leasing at eight North Carolina locations. We are presently interested in Respondent's branch in Hickory, North Carolina, at which Cecil Shields was hired in June 1982[3] into a complement of some 15 employees. The employees are not represented by a labor organization. Shields worked for Respondent as a "tire man"; his duties included putting new tires on trucks and doing the paperwork required to maintain a running inventory of tires.

Charles Ellis, a vice president of Respondent, is in charge of the Hickory facility. Called as an adverse witness by the General Counsel, Ellis testified that he made the decision to discharge Cecil Shields on October 26. Ellis said that his reasons for discharging Shields were that "his work was not at an acceptable level, bad attitude, and other reasons." Subsequently, Ellis retracted the reference to "other reasons," but later, having been refreshed by Respondent counsel's reference to Ellis' affidavit, he added an allusion to "a downturn in our business at this time."

Ellis fleshed out the claim of inadequate performance by asserting that Shields had kept his work area in a "very poor condition," that Shields had failed for 5 days in September to inventory some new tires as Ellis had told him to, that Shields had often failed to complete assignments on time, etc. Ellis further stated that in late September, he and Hickory Service Manager Joseph Stoy had talked to Shields about his unacceptable performance; there is in evidence a memorandum bearing the date of September 28, which purports to commemorate this warning meeting. The memorandum, which Ellis testified was made by him after the meeting, lists five functions which Shields was purportedly told that he must sedulously perform from then on ("Cecil must brand all tires when received," and the like). Although Shields denied at the hearing that such a meeting had ever occurred, counsel for the General Counsel introduced the memorandum (which, presumably, was supplied to her during the investigation), apparently for the purpose of demonstrating that Respondent's officials

[1] Respondent also submitted a letter in reply to the General Counsel's brief, citing a case in an effort to meet a proposition argued by the General Counsel. The General Counsel has filed a motion to strike Respondent's letter, on the grounds that the Board's Rules and Regulations make no provision for reply briefs and that I have not authorized the filing of such briefs. The motion to strike is granted.

[2] Certain errors in the transcript are noted and corrected.

[3] All dates hereafter refer to 1982.

were not to be trusted to tell the truth. The point seems well taken.

Thus, the note is dated September 28, and Ellis' pretrial affidavit, given on November 22, also refers five times to the meeting of September 28. Stoy's affidavit also gives the day of the meeting as September 28. But, as counsel for the General Counsel established through the introduction of timecards, Shields was not at work on September 28. Counsel argues, consequently, that Ellis and Stoy must have discovered that fact after giving their affidavits and must have realized that it would be necessary to amend the date in their testimony. Although there could be an innocent explanation for this discrepancy, there are too many other problems here to chalk them all up to carelessness or forgetfulness.

For example, Stoy testified that, at the "September 29" meeting, he was present only long enough to hear Ellis "start . . . to talk to [Shields] about his slow work and about tidying up the tire bay area" and then was called away, missing the bulk of the meeting. Stoy's affidavit, however, refers to "our meeting with Shields which lasted about 20 or 15 minutes," and it goes on to describe the meeting in some detail. The affidavit gives no indication that Stoy left the meeting.

The Stoy affidavit further states that Ellis and Stoy gave Shields a copy of the five-item memorandum purportedly made by Ellis, but Ellis testified that he did not give Shields a copy; Ellis testified, in fact, that the memorandum was made "after the meeting." But Ellis' *affidavit* expressly refers to "the written warning of 9/28 in Stoy's presence." Stoy testified in explanation of his own affidavit on this point that the Board agent "put words that I did not say down on the paper," but, as counsel for the General Counsel pointed out, the very sentence of the affidavit containing Stoy's account of having given Shields a copy of the note contains a correction relating to the word "copy."

In addition, although Stoy's *affidavit* states that "Ellis asked me to bring [Shields] into the office" for the meeting and further mentions that it was Stoy's own complaints which had caused Shields to be "brought . . . into the office," Stoy *testified* that the meeting took place when Ellis "called me back to *the tire bay* . . . to have a meeting." This testimony made Stoy's version consistent with Ellis' account. In explaining the variance between his affidavit and his testimony, Stoy again criticized the Board agent and said that the document itself showed that a correction had been attempted; it does not, however.[4]

Shields, on the other hand, testified that he had never attended any meeting like the one described by Ellis and Stoy, and said that the only time he was ever criticized was on an occasion when Stoy found a lug nut loose on a truck tire. I am strongly inclined to prefer Shields' testimony over that of Respondent's witnesses. Not only did Shields make a more personally convincing witness than both Ellis and Stoy, but the modifications, conflicts, and discrepancies in their testimony as set out above, as found elsewhere in the record, and as discussed hereafter, make it appear that they are not very reliable witneses.

It is therefore my impression that there really was no serious concern about the quality of Shields' work. Aside from generalities about the slowness of his performance and his disorderliness, only a few specific problems were described. Stoy said that there was an occasion, perhaps in August, when Shields mounted 11 tires of the wrong size on a truck, an error caught by the customer. Ellis referred to a time in September when he and another employee had to perform a work function for Shields. Some inventory sheets produced by Respondent seemed to show that, for a 4-day period in October, the running inventory which Shields was supposed to maintain failed to reflect the disposition of 10 tires. There is no indication in the record that this delay in recording the transfer of these tires was of any significance, judging from Ellis' evident lack of urgency about the matter, as his testimony implied. Note should also be taken of Shields' testimony, substantially corroborated by Stoy, that there came a time when the fuel man was reassigned and Shields was given the duties of the fuel man in addition to his own. There can be no doubt that, in view of this double duty, Shields would not have been expected to turn in a flawless performance in his tire-man role.

A telling point as to his job performance is that Shields was on a 90-day probationary period which expired at the end of September. Although nearly all of the flawed work performance referred to by Ellis and Stoy had purportedly occurred before the trial period ended, Shields was not released at that time, but, presumably, was thereafter regarded as a permanent employee.

Although I have discussed at some length the issue of Shields' alleged shortcomings, I have done so essentially for the purpose of limning the baselessness of Respondent's claim that Shields was an unacceptable employee. Merely demonstrating a sine qua non causal relationship between Shields' asserted protected activity and his discharge would have taken much less time, for, as will be shown hereafter, Ellis conceded at the hearing that the real motive force behind the October 26 discharge was certain statements made by Shields in the course of a company-sponsored fishing trip on a preceding weekend; it is appropriate to turn now to that weekend trip.

On October 17–18, Respondent treated several of its employees from various North Carolina locations to an overnight fishing trip at a nearby campground. Among those present were Thomas Teague, Respondent's president, and Henry Bondurant, another vice president (who apparently was located at Greensboro temporarily). In the evening of the first day, several of the travelers played cards in Shields' room. As they played, one of the men brought up the fact that Shields had formerly worked at the local General Electric Company plant, from which he had been laid off. That plant was unionized.

[4] In stating on brief, "Ellis admitted that he provided an affidavit to the National Labor Relations Board wherein he stated that a copy of '. . . the written warning of September 28 in Stoy's presence' [G.C. Exh. 2] was given to Shields during the meeting [Tr. 142]," the General Counsel errs. The words quoted by counsel are from Ellis' affidavit, but he does not there refer to having given a "copy" of the warning to Shields, although the inference seems reasonable. The transcript reference is to the testimony of Stoy, not Ellis.

Shields replied that he wished he were back at General Electric "making nine dollars and a half an hour." In response to some questions, he related the amount of union dues he had paid, and he described the generous benefits, including comprehensive health insurance, 11 paid holidays, 3 weeks of vacation, and 3 days of sick leave. When asked by another employee how the fishing trip compared to that array of benefits, Shields said that "it wasn't nothing compared to what we had at G.E."

Shields was further asked if he would return to the General Electric job if he had the opportunity, and he declared that he would be "a fool not to go back," since he needed only 6 more months to have his pension vest. He indicated, however, that he did not think that he could return in less than "maybe within a couple of years," given the state of the economy. At some point during the poker game, Shields, making reference to a small pot won by another player, said, "Drag that little bit a change, or chicken feed. That's what I'm making." He also said to Vice President Bondurant, however, that he "liked [his] job at Salem."

On Tuesday, October 26, according to Shields' testimony, Service Manager Stoy escorted Shields to Ellis' office, with Stoy telling Shields on the way that he had "nothing to do with it" and that Shields was "a good worker and dependable and [had] done [his] job."[5] In the office, Ellis told Shields that Vice President Bondurant had informed Ellis as to what Shields had said at the card game, and said that President Teague "had give [Ellis] the orders to let [Shields] go." Ellis said that Shields had been "bragging on [his] benefits at G.E., and throwing off on their company." Shields denied that he had been "throwing off on their company," but Ellis said that "he was going to let [him] go back to G.E."

As earlier stated, at the hearing Ellis mentioned "bad attitude" as one of the reasons for discharging Shields. The record shows that Shields' "bad attitude," as displayed on the fishing trip, was the crucial factor in bringing about the decision to terminate. Ellis was asked at the hearing how he had chosen October 26 as the day for discharging Shields. He responded, "After I received the call from Mr. Teague about the bad attitude problem, I told him at that time I would have a meeting with Mr. Stoy, our service manager. After this, I made a decision, after that, to terminate Shields."

Ellis testified that, "a day or so after the fishing trip," he heard about the "bad attitude" when President Teague "called me at one time and he said in discussing, in talking with Henry Bondurant that Henry Bondurant had stated to him that he felt Shields had a bad attitude." Ellis denied, however, that Teague had explained to him why Bondurant thought Shields' attitude was "bad," although he did know, he said, that it had to do with the fishing trip. While Ellis stated most improbably at the hearing that Shields had been the first to bring up the matter of the fishing trip in their discharge interview ("I told Shields that he was being discharged for unacceptable work. At this time Shields butted in and started telling me about the fishing trip he had been on"), his pretrial affidavit is to the contrary ("And I asked him about some comments he had made during the Company fishing outing to Henry Bondurant").[6]

President Teague testified that, after the fishing trip, he made a routine business call to Bondurant in Greensboro and, in its course, inquired about the reaction of the employees to the trip. Bondurant assertedly responded that the employees had had a good time, "although I think we have a problem." Asked to explain, Bondurant allegedly stated, "We've got one guy in Hickory by the name of Shields that has a real serious attitude." According to Teague, he did not ask for any further specifics of the "attitude," but in the course of another routine call "a few minutes" later, he told Ellis, "Hey, Charles, I understand we have an employee in Hickory by the name of Shields that really has a bad attitude. Teague testified that he "didn't go into it with Charles or to Henry as to what type of bad attitude."

Thus, according to Teague and Ellis, Bondurant told Teague that Shields had a "real serious" attitude. Teague then told Ellis that Shields had "a bad" attitude, and Shields was thereupon discharged, but nobody told nobody what kind of "attitude" they were referring to. I am constrained to express my serious doubt that the two conversations were so terse.

Two other witnesses gave testimony bearing on Ellis' state of mind in discharging Shields. One of them, Michael Gross, a washboy at Respondent's facility, was called by the General Counsel in the hope that he might give testimony similar to that contained in his pretrial affidavit, to wit, that shortly after Shields was discharged on October 26, Gross heard Ellis tell Stoy that "he should not have hired a union man." At the hearing, however, while Gross admitted that he had signed the affidavit and had initialed corrections on it, he also said (1) that he was so drunk when he gave the affidavit that he did not know what he was signing, and (2) that he did not in fact overhear such a remark by Ellis to Stoy.

I received the document in evidence over Respondent's objection phrased as follows: "I would object to the admission, since he doesn't remember reviewing it and reading it before he signed it." There is, however, a more fundamental problem in connection with such a document which may warrant further consideration: whether it constitutes unreliable hearsay evidence.[7]

Section 10(b) of the Act provides that Board hearings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States." The Board has held, in *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), that "the Board is not bound to follow the strict rules of evidence applicable in the Federal courts,"

[5] Stoy testified that he had only told Shields that he "didn't hold anything against him." For the reasons earlier given, I would put more faith in Shields' testimony than in Stoy's.

[6] Similarly, although Ellis twice testimonially denied having had a "personal discussion" with Bondurant about Shields' attitude, his "personal discussion" with Bondurant about Shields' attitude, his affidavit, given less than a month after the discharge, states, "Bondurant told me Shields was not happy working for us."

[7] The following discussion is premised on the possibility that Respondent's objection may be thought to have preserved the point.

citing, inter alia, legislative history showing that Senator Taft deemed the 10(b) phrase "so far as practicable" to "give . . . to the trial examiner considerable discretion as to how closely he will apply the rules of evidence.[8]

In *Bart*, the Board held admissible for substantive purposes two pretrial affidavits which had been given to a Board agent by an employee. The affidavits tended to show that the employee was a supervisory employee, contrary to the testimony given by the employee himself when called as a witness by the General Counsel, and the administrative law judge relied on the affidavits in concluding that the employee did in fact have supervisory status.

Although, as noted above, the Board held in *Bart* that it need not reject "probative evidence because of its technical hearsay quality," id. at 242, it also went on to alternatively test the acceptability of the disputed evidence under the Federal Rules of Evidence, and it concluded that the rules would not bar substantive use of the affidavits. Specifically, the Board addressed Section 801(d)(1) of the Rules, which provides that "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

As the Board pointed out, the history of the rules shows that this provision represented a compromise between opposing views. The Supreme Court, the Advisory Committee, and the Senate had endorsed a rule which would have made *all* prior inconsistent statements substantively admissible against the witnesses who gave them; the House passed a version which would have only permitted use of those prior statements made "while the declarant was subject to cross-examination at a trial or hearing or in a deposition."[9] The Conference Committee adopted, and the Congress enacted, a version containing limitations similar to the criteria preferred by the House, but deleting the requirement of cross-examination and also making admissible not only sworn prior statements which were given in a trial, hearing, or deposition, but also in an "other proceeding."

The intended scope of "other proceeding" is not discussed in the legislative history. It seems likely that the phrase was added (and the reference to a prerequisite "cross-examination" concurrently dropped) in response to a concern expressed in the report of the Senate Committee to the effect that the requirement that the prior statement must have been subject to cross-examination in order to make it admissible would "thus preclud[e] even the use of grand jury statements."

The Court of Appeals for the Ninth Circuit in *U.S. v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976), thought that the words "other proceeding" must have been adopted to expand the scope of the Rule even beyond the grand jury statements with which the Senate Committee was concerned, on the theory that if Congress had intended to extend the Rule only to grand jury statements, it could easily have said as much. The court thereupon upheld receipt of the testimony of an immigration agent regarding sworn statements given to him by some witnesses in conflict with their present testimony, holding that the interrogations were sufficiently formal to constitute an "other proceeding."[10]

In *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976), the Court of Appeals for the Fifth Circuit approved the use, as substantive proof, of pretrial statements given to the FBI witnesses who became hostile to the Government at the trial. There is no indication in the opinion that the statements were sworn, although it is mentioned that the witnesses had signed forms waiving their rights. The *Leslie* court cited and discussed Rule 801(d)(1), but seemed to rely more heavily on Rule 803(24) as its basis for receiving the FBI statements. That provision is the final one of a list of "hearsay exceptions," and it affords discretion to a tribunal to accept hearsay as probative evidence if it is:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

In *Bart*, supra, when the Board considered the alternative question of whether the pretrial affidavits qualified as statements admissible under Rule 801(d)(1), the possibility of deeming such statement-taking as an "other proceeding" was not discussed. Instead, the Board focused on the term "deposition" as used in the Rule, saying that there is "good reason to treat" affidavits as depositions; the analysis is that since Rule 801(d)(1) does not require depositions to have been subject to cross-examination in order to be admissible, there is no material difference between such a deposition and a sworn statement.

The Board's holding in *Bart* that it "is not bound to follow the strict rules of evidence applicable in Federal courts" appears to leave the factfinder relatively free to determine, with appropriate deference to the Federal Rules, the probative value of Gross' affidavit on the record made here. As earlier noted, there is respectable authority for the substantive receipt in evidence of a witness' contradictory pretrial statement with no limitations at all. The Supreme Court, the Rules Advisory Committee, and the U.S. Senate all thought that such a rule would be advantageous; the Uniform Rules of Evidence

[8] The Board recently reaffirmed the *Bart* approach in *Roofers Local 135 (Advanced Coatings)*, 266 NLRB 321 fn. 1. (1983).

[9] This and other references are from the collected legislative history in "Federal Rules of Evidence for United States Courts and Magistrates." West Publishing Co., 1979, pp. 94–99.

[10] The statements were taken by advising the witnesses of their *Miranda* rights, placing them under oath, and interrogating them. The Court noted that it was not holding that "every sworn statement given during a police-station interrogation would be admissible," a set of facts which the Court said that it need not reach. Id at 1058.

(Rule 801(d)(1)) would permit the introduction for substantive use of any kind of prior statement so long as the declarant testifies and is subject to cross-examination (except in criminal proceedings, in which the under oath and other limitations prescribed by the Federal Rules apply); and several jurisdictions (New Jersey, California, Utah, Nevada, New Mexico, and Wisconsin) have adopted similar rules.

In the present case, having observed Gross closely at trial, I have no doubt at all that he overheard the statement contained in the affidavit and that he knew what he was doing when he signed, and initialed corrections on, the document. Nothing could have told the tale more graphically than the desparate unease displayed by Gross in attempting to convey the message that he had been so inebriated that he did not know what he was signing. He did, however, recall that counsel for the General Counsel, who had visited Gross to take the statement, had asked him at that meeting if he "had overheard such a conversation"; he did remember that she then wrote words on the affidavit; he did recall that he "had [the affidavit] in [his] hand for several moments before [he] gave it back"; and he did remember that he signed and initialed it. He further admitted that, when counsel for the General Counsel departed, Gross' wife had "started crying because of things I said—well, the things that I was asked and answers I give."[11] This clearly indicates that Gross did tell counsel what the affidavit shows; and Gross' ability to presently recall his wife's distress after counsel had left his house, and other details, certainly refutes the claim of stupefied intoxication.[12]

But even if Rule 801(d)(1) were held to be strictly applicable, its conditions have been met. As indicated, the Board in *Bart* found that the taking of a statement by a Board agent is the equivalent of a "deposition"; in any event, as also shown, there is authority for the principle that a statement[13] to a Government investigator can constitute an "other proceeding." *U.S. v. Castro-Ayon*, supra. Moreover, if Rule 803(24) may be alternatively applicable, as the *Leslie* court thought, supra, the same analysis used by the court in that case would be appropriate here for concluding that the affidavit is admissible.[14]

Gross once told a Board agent that he overheard the statement. Clearly, his concern about preserving his job has now led him to recant. In deciding that the truth is not what Gross says now but what he said before, as Judge Learned Hand pointed out in *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925), I am deciding on the basis of my observation of Gross at the hearing. Gross' every word and gesture convinced me that his affidavit more faithfully reflected reality than did his testimony.

The remaining evidence bearing on Respondent's intention was given by Tony Van Horn, a former employee who was discharged by Ellis and Stoy on October 25, the day before Shields' termination. During Van Horn's discharge interview, Ellis "said that Cecil liked G.E., G.E.'s benefits, their pay, and stuff so good, that he was going to let Mr. Shields go back to G.E." Ellis added that both Van Horn and Shields were "good workers" and it would be "hard to replace" them, but "our mouths got us in trouble."[15]

Van Horn also testified that in the last part of September 1982, Ellis told some of the employees that they would have to cut down on overtime, but that they would still be working 40 hours "and we ought to be thankful for that, be thankful that there wasn't any Union organizations [sic] because all these Union places was going broke."[16]

The General Counsel makes two basic assertions here. The first is that the October 17 fishing trip conversation "was itself protected concerted activity" within the meaning of the statute, and the termination of Shields for engaging in the conversation accordingly violated Section 8(a)(1). The other contention is that the evidence supports an inference that "Respondent feared [Shields] would influence other employees to desire union representation," and that a discharge so motivated violates Section 8(a)(3). The contentions are considered below.

Section 7 of the Act proclaims an employee right, safeguarded by Section 8(a)(1), to engage in "concerted activities for the purpose of other mutual aid or protection." The spectrum of "concerted" activities is broad. It manifestly includes such behavior as a strike, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1969), the circulation of a petition, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 627 F.2d 766 (7th Cir. 1980); and the leafletting of employees by a fellow employee, *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320 (7th Cir. 1976). It is, indeed, concert enough if there is "only a speaker and a listener," *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853 (1951).

But Section 7 says that it is not sufficient that a speaker simply have the ear of a listener; the conversation must be, the statute says, "for the purpose of . . . other mutual aid or protection" in order to be sheltered by Section 7. In the present case, there is no indication that

[11] Gross' wife was fearful that he might lose his job.

[12] At the tail end of his testimony, when asked by counsel for the General Counsel if he had not told Shields that he had overheard Ellis tell Stoy that he "shouldn't have hired a union man," Gross answered, "No. Not as I recall." When then asked if his reply meant that it was "possible that [he] did", Gross said, "I don't know."

[13] I recognize that Gross, asked if he was sworn in by counsel when the statement was taken, twice answered, "No" and the third time replied, "Not as I remember, I didn't." The first two answers contradict, in their positiveness, the claim of inebriation. The affidavit itself states that Gross was "first duly sworn upon [his] oath"; there is a jurat at the bottom signed by counsel for the General Counsel. I feel confident that Gross was indeed sworn, if that ceremony matters.

[14] Rule 803(24) also contains a notice provision. In *Leslie*, the Government failed to comply with the provision, but the court could find no prejudice arising therefrom. The same is true here, I believe; Respondent asked for no additional time to consider or meet the evidence, and Respondent's counsel thereafter questioned Service Manager Stoy as to whether Ellis had said to him that he "shouldn't have hired Mr. Shields because he was a union man." Stoy testified that Ellis had said "nothing at all" like that. Stoy's demeanor and the quality of his testimony in general left the impression that he had little fidelity to the truth, and I do not believe him on this point either.

[15] Van Horn was fired for using the CB radio "to call Tommy Teague and Charles Ellis SOB's."

[16] Ellis did not controvert either statement attributed to him by Van Horn.

Shields had any such specific purpose in mind in his casual discussion of the General Electric benefits elicited by another employee during the poker game. The General Counsel, however, argues for the principle that "discussion of wages is an important aspect of organizational activity," that "[t]he free discussion of wages and benefits are at the heart of Section 7," and that any unreasonable interference with the right to discuss working conditions abridges the statute.

Whether the Board agrees with this notion is debatable. The Board has occasionally approved such a "planting of the seed" approach. Thus, in *Office Towel Supply Co.*, 97 NLRB 449 (1951), an employee was discharged for remarking to other employees, "This is a hell of a place to work. They expect one girl to do the work of five and a girl doesn't even get time to go to the ladies' room." The Board (Chairman Herzog dissenting) held (id. at 451):

> Jenifer's statement to the group was itself a complaint against existing conditions of employment, calculated to induce group action by the employees to correct a grievance. Such activity by Jenifer was an "indispensable preliminary step to employee self-organization" and therefore enjoyed the protection accorded concerted activity under the Act. Any other view concerning Jenifer's discharge would permit an employer to frustrate concerted activity at its inchoate stage and make a mockery of Section 7 of the Act.

Because the same employee conversation in which Jenifer made these remarks also addressed the need for unionization (a fact unknown to the employer), the Board's references to the statement being "calculated to induce group action" and a "preliminary step to employee self-organization" may be based on that distinctive feature of the case. The Court of Appeals for the Second Circuit (Judge Clark dissenting) reversed, 201 F.2d 838, considering the Board's language abstractly and holding: "Such a doctrine would prevent an employer from discharging any employee who, in the presence of fellow-employees, expressed a severe condemnation of the employer's ways, because any such grousing, in and of itself, would be 'calculated to induce group action by the employees to correct a grievance' and therefore amount to 'concerted activity at its inchoate stage.'" Id. at 841.

There is considerable authority, in agreement with the Second Circuit, that the "purpose" requirement contained in Section 7 cannot simply be ignored. The most widely quoted analysis is found in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), where an employee was discharged for "talking to other employees and advising them of their rights." Reversing the Board's finding of an 8(a)(1) violation, the court wrote (id. at 684–685):

> We look in vain for evidence that would support a finding that Keeler's talks with his fellow employees involved any effort on his or their part to initiate or promote any concerted action to do anything about the various matters as to which Keeler advised the men or to do anything about any complaints and grievances which they may have discussed with him. It follows that, if we were to hold that Keeler's conversations constituted concerted activity, it could only be upon the basis that any conversation between employees comes within the ambit of activities protected by the Act provided it relates to the interests of the employees. We are unable to adopt this view.
>
> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.
>
> This is not to say the preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. However, that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to.
>
> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping."
>
> There being no evidence that any question of group action entered into the conversations, we hold that Keeler was not engaged in concerted activities within the protection of Section 7 of the Act.

Subsequently, in *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1348 (3d Cir. 1969), the same court stated that "'[m]ere griping' about a condition of employment is not protected, but when the 'griping' coalesces with expression inclined to produce group or representative action, the statute protects the activity." In *Dreis & Krump Mfg. Co. v. NLRB*, supra, 544 F.2d at 327, the Seventh Circuit held that the mantle of Section 7 extends to "conduct which intends or contemplates as its end-result group activity which will benefit the participants in their status as employees." And in *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979), the Sixth Circuit stated that, in order to be protected, a claim or complaint "must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action."

In other words, say some courts of appeals, "public venting of a personal grievance, even a grievance shared by others," is not necessarily protected, *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 (7th Cir. 1981); there must be something more than "mere talk" in order to characterize conversation as designed to promote "mutual aid or protection."

There is evidence that the Board has accepted the *Mushroom Transportation* approach. In *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980), I quoted and applied the *Mushroom* standard without comment by the Board. In *Egar Employment, Inc.*, 255 NLRB 113, 119 fn. 24 (1981), I listed a number of Board cases which had cited *Mushroom* approvingly and concluded that "it appears that the Board has now adopted that standard as its own"; in passing on my decision, the Board did not demur.

On the other hand, counsel for the General Counsel cites *Datapoint Corp.*, 246 NLRB 234 (1979), enf. denied 642 F.2d 123 (5th Cir. 1980), and *International Business Machines Corp.*, 265 NLRB 638 (1982), in support of the proposition earlier set out. The latter case, I think, argues against the General Counsel's contention, since there the Board's comment (in dicta) that "discussion of wages is an important part of organizational activity" was immediately thereafter linked to the rights of "employees who seek to engage in concerted activities for mutual aid or protection."[17] As I read the case, the Board there recognizes the possible distinction between discussion of wages in general and participation in concerted activity.

Datapoint is, I think, not so easily distinguished. In that case, the Board did use language: "[A]n individual's actions may be considered concerted in nature if they relate to conditions of employment that are matters of mutual concern to the affected employees"; "Discussion among employees concerning working conditions is a necessary initial step in concerted activity and to deny protection to this type of discussion because of a lack of fruition in later action would be to nullify the rights guaranteed by Section 7 of the Act." It could be argued that the Board here was persuaded by the particular facts, which showed a substantial amount of concert, activity, and joint concern. Nontheless, the Board's statement of law is clear enough and broad enough to indicate that the Board fully intended to make a sweeping declaration.[18]

I am less than sure of the Board's current position on this point. In *Plastic Composites Corp.*, 210 NLRB 728 (1974), a case decided before *Datapoint*, the Board adopted a recommendation by an administrative law judge for the dismissal of an allegation relating to an employee who was fired, inter alia, for telling other employees about his rate of pay at a prior job; the administrative law judge wrote (at 737–738):

> There is no question but that they were engaged in conversation and that George was fired because of the effect, or possible effect, of the subject matter on other employees. But there is no evidence that as a group or individually any of them did anything or were about to do anything about the subject.

That disposition seems contrary to *Datapoint*, as does *Egar Employment*, supra, decided after *Datapoint*, in which the Board agreed that the employer did not violate the Act by discharging an employee for advising other employees to maintain their own records. Both *Plastic Composites* and *Egar* might well have been decided differently under the language of *Datapoint*. I may note that while two of the members who decided *Datapoint* are no longer on the Board, a recent case to be discussed hereafter, *Atlanta Newspapers*, 264 NLRB 878 (1982), was signed by two present members and contains language similar to that used in *Datapoint* ("Employee speech, regardless of whether the listener is a supervisor or another employee, is often an essential means of achieving group goals and to deny protection to this type of activity would nullify the rights guaranteed by Section 7 of the Act").

In sum, I am not certain whether the Board would currently hold that a violation could be grounded here solely on the fact that Shields was discharged because he engaged in a discussion with other employees about working conditions. My own belief is that such a holiday extends the statute beyond its intended scope.

I need not speculate on which result would be most acceptable to the present Board, however, because there is another and, I believe, more clearcut basis for finding a violation of Section 8(a)(1). A second look at the poker game conversation is required.

The discussion consisted of an enthusiastic rehearsal by Shields of the benefits he had received at the General Electric plant; the context was the plant's union representation, with reference to the amount of dues paid by employees in exchange for the benefits ("That sounds good," said the other employee, "Tell me more"). *Mushroom Transportation*, as earlier set out, would protect conversations that have "some relation to group action in the interest of the employees." That phrase has been applied rather literally in at least two cases of which I am aware.

In *Signal Oil & Gas Co.*, 160 NLRB 644 (1966), enfd. 390 F.2d 338 (9th Cir. 1968), an employee who was not in the bargaining unit was asked by another such employee what he thought of the possibility of a strike in the bargaining unit. The first employee replied, "Good, good, I hope they do," and he was later discharged as a consequence of making the remark. The Ninth Circuit,

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[17] "It is well established that discussion of wages is an important part of organizational activity. Thus, to the extent that an employer's policy of classifying its wage information 'muzzles' employees who seek to engage in concerted activity for mutual aid or protection by denying the very information needed to discuss wages, it adversely affects employee rights."

[18] The Court of Appeals for the Fifth Circuit reversed *NLRB v. Datapoint Corp.*, 642 F.2d 123 (5th Cir. 1981). The court said that it would not adopt a principle "by which virtually any action taken by a single employee in any way related to wages, hours or the terms and conditions of employment would be considered protected concerted activity. If Congress had intended Section 7 to be read so broadly, it certainly would have done so with much more definite language, and courts would have discovered that intent long ago."

relying on the "some relation to group action" language of *Mushroom Transportation*, agreed with the Board that the discharge was violative. That the remark was a "casual" one and was made by one nonunit employee to another such employee made no difference, said the court: "speech supporting . . . joint action is protected." 392 F.2d at 343.

The Board has recently applied *Signal Oil & Gas* to a fact situation perhaps even more remote from the central core of concerted activity. In *Atlanta Newspapers*, supra, a union had filed a petition for representation of certain of the employer's circulation employees. A dispatcher, who was not involved in the organizing campaign, one day made a business call to the loading dock supervisor and, in the course of conversation, asked if he heard that the circulation employees were going out on strike. When management thereafter investigated and the dispatcher refused to cooperate, she was discharged for spreading a rumor and then lying about having done so.

Invoking *Signal Oil*, the Board held that the dispatcher's remark "had some relation to group action," in that it "related to protected activity which had engendered concern among [the dispatcher's] fellow workers." In other words, Section 7 affords protection to a nonunit employee who passes on to a supervisor (arguably for the benefit of the employer) a rumor that the employees in a petitioned-for bargaining unit might strike. As I read this decision, it means that penalizing an employee for making any sort of reference to collective action (and, under Section 7, it would not seem to matter whether the collective action is in esse or in futuro) is prohibited by the statute.

In the instant case, Respondent discharged Shields for "bragging on [his] benefits at G.E., and throwing off on their company." The point of the card-game conversation, as all the employees understood, was the tangible benefits secured by union organization. More so than in *Cox Enterprises*, I think, the conversation here in issue bore "some relation to group action."

I think there also is merit to the 8(a)(3) violation charged, although it is not clear beyond dispute.

When an employer discharges an employee for talking with other employees about wages and working conditions, and there is no other evidence as to his motivation, two principal inferences seem to be available to explain the discharge. The simpler one is that the employer fears that such discussions will demoralize and unsettle his employees. The other, more specific, explanation is an employer concern that such talk will demoralize the employees to the point of opting for unionization or some less formal type of concerted activity. Where there is no indication of the precise nature of the employer's concern, there is no basis for finding that the discharge was provoked by fears related to Section 7 as opposed to the simpler concern about demoralization.

Here, however, there is some basis for inferring that Shields' union benefits conversation gave rise to a union-related concern on Respondent's part which brought about his discharge. There are several reasons for making that characterization.

For one thing, the dearth of any credible proof that Shields was a plainly inadequate employee points up the perceived urgency of the need to get rid of him after his card-table remarks, and suggests that Respondent's concern may have been specific in character.[19] That Respondent's high officials such as Teague and Ellis engaged at the hearing in the utterance of solemn nonsense about their and Bondurant's nonexplanation to one another of Shields' "bad" attitude further indicates a suspicious guardedness about the true character of Respondent's concern.

Then there are the late September remarks, recounted by Van Horn, in which Ellis told some employees to be grateful for working 40 hours a week and to "be thankful that there wasn't any Union organizations [sic] because all these Union places was going broke." The gratuitous comment shows that Ellis had the possibility of union organizing not far from the forefront of his mind and also conveys the intensity of his satisfaction that, thus far, Respondent had been spared such a fate.

Finally, and most directly, there is Gross' affidavit evidence that Ellis told Stoy, on the day of the discharge, that the latter should not have hired a "union man." Not only does this show, contrary to Ellis' testimony, that he well knew exactly what kind of "bad attitude" Shields had exhibited at the poker game, but it also specifies the side of Shields which, presumably, most deeply concerned Respondent—his "union man" aspect.

Taken together, these factors make it proper to infer that a substantial motivation for discharging Shields was the possibility that his continued employment might result in union organizational activity. To find an 8(a)(3) violation, it is not necessary to conclude that Shields was about to embark on an organizational effort or that Respondent was positive that he was thinking of doing so; it is enough to infer that Respondent was sufficiently concerned about such a development and that the concern constituted a motivating factor in the discharge. I think the evidence preponderates in that direction and is the most realistic inference to be drawn from this record. Ellis' reference to Shields' undesirable "union man" background strongly suggests a fear that Shields would continue to speak favorably of his union benefits. The court held in *Ethan Allen, Inc. v. NLRB*, 513 F.2d 706, 707 (1st Cir. 1978), that an employer may not, "even in the absence of an organizing drive, discharge employees who express prounion attitudes." The reasoning applies to the discharge of an employee grounded in an employer's apprehension that he will continue to express "prounion attitudes" by extolling the benefits received by him in unionized employment.[20]

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[19] Respondent notes on brief some rather vague testimony about a decline in business. The reason for, and the timing of, the reduction in the employee complement from 17 in October 1982 to 11 in February 1983 (Ellis' testimony) were not described in any detail. The fact is that Ellis only recalled that "a downturn in our business" had "some effect" on the discharge of Shields after his recollection on this point was refreshed by being shown his affidavit by Respondent's counsel; this suggests that business conditions could not have been much of a factor in Ellis' mind when he discharged Shields. That Respondent no longer has a full-time tire changer says nothing about the situation at the time of Shields' termination.

[20] The test mandated by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), is that the General Counsel must make a prima facie show-

Continued

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Cecil Shields on October 26, 1982, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Cecil Shields on October 26, 1982, I shall recommend that Respondent be required to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the aforesaid date of his termination to the date of Respondent's offer of reinstatement, less net earnings during such period. The backpay provided herein shall be computed on a basis of calendar quarters in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also recommend posting of the traditional notices and other customary relief.

On the basis of these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Salem Leasing Corp., Hickory, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees in regard to their hire, tenure of employment, or other terms and conditions of employment, in order to discourage membership in labor organizations or in a manner which interferes with the rights guaranteed employees by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Offer Cecil Shields, if Respondent has not already done so, immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges and make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful discrimination against him, in the manner set forth in the section of this decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Hickory, North Carolina facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Expunge from its files any reference to the discharge of Cecil Shields on October 26, 1982, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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ing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Application of that test requires that a violation be found here.

Thus, the prima facie case, discussed above, supports at least an inference that protected conduct was "a motivating factor" in the decision. Respondent has failed to shoulder the burden of demonstrating that the same action would have taken place regardless of the protected aspect of the conduct. It follows that the case has been made.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any employees in regard to their hire, tenure of employment, or any term or condition of their employ-

ment in order to discourage membership in labor organizations or in a manner which interferes with the rights guaranteed employees by Section 7 of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL offer to Cecil Shields, if we have not already done so, full and immediate reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other privileges, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our unlawful discharge of him on October 26, 1982.

WE WILL remove from our files any reference to the foregoing discharge and WE WILL notify Cecil Shields in writing that we have done so and that the discharge will not be used as a basis for future personnel actions against him.

SALEM LEASING CORP.